

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESTERVINA PAULINO,

Plaintiff,

-against-

07 Civ. 5773 (LAK)

COMMISSIONER GLADYS CARRION, et al.,

Defendants.
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ORDER

LEWIS A. KAPLAN, *District Judge*.

Defendant Gladys Carrion objects to the report and recommendation of Magistrate Judge Gabriel W. Gorenstein to the extent that it recommends that her motion for judgment on the pleadings dismissing the complaint as to her for lack of subject matter jurisdiction be denied.

The gist of this Section 1983 complaint is that the defendants wrongfully procured a waiver of plaintiff's right to a hearing in violation of her right to due process of law. The contention that the Court lacks subject matter jurisdiction rests on the assertion that the complaint fails to state a claim upon which relief may be granted under Section 1983 and, in consequence, that no substantial federal question is presented.

In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court held that the failure of a complaint to allege facts sufficient to state a federal claim upon which relief may be granted does not deprive a district court of federal question jurisdiction unless, so far as is relevant here, the purported federal claim "is wholly insubstantial and frivolous." *Id.* at 682-83. If anything, *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235 (2006), reinforced that view.

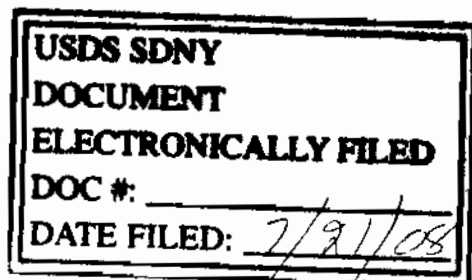
Magistrate Judge Gorenstein observed that defendant Carrion did not argue that plaintiff's federal claim falls within the exception to the rule of *Bell v. Hood* and therefore declined to address the merits of the claim against her. In any case, having reviewed the complaint, the Court cannot say that this claim is wholly insubstantial and frivolous.


The Court has considered this defendant's other arguments and found them to lack merit.

Accordingly, defendant Carrion's motion for judgment on the pleadings dismissing the complaint as to her for lack of subject matter jurisdiction is denied.

SO ORDERED.

Dated: July 18, 2008





Lewis A. Kaplan
United States District Judge